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In the Supreme Court of the United States

October Term, 1946 - - - - - Number 875

PHILIP B. FLEMING, Temporary Controls Administrator, Office of Temporary Controls,

Petitioner,

vs.

ROYAL LEE, doing business as VITAMIN PRODUCTS COMPANY,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

DECISION OF THE COURT BELOW.

The petition for writ of ceriorari seeks review of a decision of the United States Emergency Court of Appeals, 158 Fed. 984, rendered December 13, 1946.

In such action, the above named respondent was the complainant and Paul A. Porter, Price Administrator (of the Office of Price Administration) was the respondent.

On December 13, 1946, said Court duly entered its judgment declaring Revised Maximum Price Regulation No. 296 to be invalid from its inception insofar as it applied to specially milled whole wheat flour of the type of said complainant's Deaf Smith Flour. (R. 148)

On December 14, 1946, upon the exparte application of the above named petitioner, said Court amended its opinion to substitute said petitioner as respondent in said proceeding in the place and stead of said Price Administrator. (R. 148-149)

NATURE OF THE PROCEEDING.

The proceedings in the court below was an action brought by the respondent (upon this petition) against the Price Administrator of the Office of Price Administration under Section 204(e) of the Emergency Price Control Act of 1942, as amended.

An action for damages and for an injunction for the alleged violation of RMPR 296, concerning wheat flours, had been commenced by the Price Administrator against the respondent in the District Court for the Eastern District of Wisconsin. The alleged violation was his sale of the specially milled (stone ground) whole wheat flour at prices in excess of the maximum prices established by said regulation for the standard commercial flours. Being unable to raise the question of the validity of said regulation in said court, the respondent was obliged to rely for relief upon such commencement of an action in the Emergency Court of Appeals under Section 204(e) of said Act.

Judgment for damages and for an injunction was therefore entered against the respondent in said District Court. (R. 94-95) Said court thereupon granted leave to the respondent to commence an action in the Emergency Court of Appeals. (R. 95-100)

The court below held that said price regulation was invalid from its inception insofar as it applied to specially milled whole wheat flour of the type of Deaf Smith Flour, milled by the respondent. (R. 141-147)

STATEMENT OF FACTS.

In these proceedings before the Emergency Court of Appeals, the Price Administrator found himself in a very unusual and somewhat embarrassing position. He was faced with the task of upholding a price regulation which was unsupported by any statement of considerations whatsoever. On the face of such deficiency in the records, the regulation in question clearly was invalid insofar as it pertained to specially milled whole wheat flours.

To present fully the issues which the court below was called upon to decide, it is necessary to supplement petitioner's statement of facts in several particulars.

In its consideration of the issues between the parties, the court below was called upon to consider the processes of manufacture, costs and qualities of two general classes of flour, namely, (a) the roller milled flours, the standard commercial flours, which included the standard commercial so-called whole wheat flours and (b) stone ground flours which include true whole wheat or whole meal flour, of which Deaf Smith Flour, produced by the complainant in the proceeding below, is a representative type. (R. 5-7; 16; 19-24) These two general types of flours have been the subject of controversy between food authorities and scientists for many years. As evidence of the distinctive recognition of stone ground flours, considerable evidence of the findings and conclusions of scientists was introduced in these proceedings. (R. 5-18; 33-41; 49-56)

The conclusions of the court below as to these two types of flours present most clearly the points of difference:

"Specially milled whole wheat flours of the type and kind of Deaf Smith Flour have been and are produced in various parts of the country and throughout the world. These flours, sometimes termed 'whole meal flours' are ordinarily stone-ground and their distinctive feature is the retention in the flour of substantially all of the germ, bran and endosperm of the wheat berry in nature's exact proportion. Standard, commercial whole wheat flours, on the other hand are ordinarily produced by the roller milling process by which commercial white flours are now almost universally produced. The Administrator in his statement of considerations accompanying RMPR 296 described that process as follows:

'To prepare wheat for milling, it is first cleaned by screening and often washed to remove dirt and other foreign matter. The grain is adjusted to the exact moisture content desired by either drying or wetting and is then ready for the milling process. This consists of a gradual reduction or crushing of the wheat berry in a number of stages. In the first of these, the wheat moves through two corrugated metal rollers which crack the berry without actually pulverizing it. A sifter then separates the crushed product into stocks of various granulations, some of which are flour. The coarser stocks go on through five or six other 'breaks' and siftings until all the bran, middlings and germ have been separated from the finely ground flour.

Some is obtained at each separation. The many operations give rise to numerous 'streams', each of which has different baking characteris-

tics. When the various streams are all combined, the flour is known as "straight". Usually the streams are separated or mixed in certain special combinations. The poorer ones are called "clears" and "cut-offs". When they have been taken out, the balance is known as a "patent".'

In the production of standard or commercial whole wheat flour by the roller milling process the practice often followed is to add selected streams of middlings to selected streams of white flour, the proportions being chosen to give the required quality and characteristics. Others produce whole wheat flour by weighing the appropriate quanities of white flour and middlings into a batch mixer. In either case, the particles of endosperm are sometimes treated with chemical agents to obtain bleaching and artificial aging effects.

In the production of his Deaf Smith Flour complainant uses a specially designed stone-grinder mill which is capable of milling to unusual degree of fineness all but a small percentage of the wheat berry, only about 5% of the berry being eliminated from the flour in the bolting process. The grinding of the flour to extraordinary fineness is intended to eliminate hard particles which may be irritating and the flour produced by the complainant has a fineness which permits its use instead of standard commercial flours for most purposes. At the same time it contains approximately 95% of the essential oils, minerals and vitamins of the original wheat berry. As a result of the use of the stone-grinding process such flour carries a much larger proportion of the thiamine of the wheat than do flours milled by the roller milling process. The complainant's flour

is not bleached or sterilized. It is milled in small quantities each day and is shipped to customers immediately since, because of i's character, it attracts insects.

Specially milled whole wheat flours of the type and kind of Deaf Smith Flour have for many years been recognized in the trade as being different and distinctive from the standard, commercial whole wheat flours produced by the ordinary roller milling process. By reason of what is believed by many physicians and other members of the public to be their higher nutritional values they are sold to hospitals, sanitariums, health food stores and bakers of health bread throughout the country. Thus complainant's Deaf Smith Flour is intended primarily for use in the daily diet of sufferers from mal-nutrition and is prescribed for that purpose by many physicians.

The cost of milling specially milled flours of the type of Deaf Smith Flour is far higher than the cost of producing roller milled flours because the process requires a much longer time (60 minutes per bushel of grain) to mill the entire wheat berry than is required by the roller milling process. Millers of commercial flours by the roller milling process are able to mill flour in large quantities, store it indefinitely and ship it without danger of insect infestation, whereas millers of specially milled flours are limited in production to quantities that can be delivered to customers and actually used within comparatively short periods of time unless they are willing to incur the expense of storage under refrigeration. As a result specially milled flours of the type of Deaf Smith Flour have at all times been sold at prices higher than those paid for standard commercial

whole wheat flours. Thus complainant since the year 1930 has produced flour of the type of Deaf Smith Flour and has sold it at all times for the identical prices which he charged subsequent to the issuance of RMPR 296 and which were substantially in excess of the maximum prices for whole wheat flours permitted by that regulation." (R. 142-144)

Some of the foregoing conclusions were, of course, disputed by the Price Administrator. However, the foregoing statement will serve to present fully the issues before the court below.

In said proceedings, the Price Administrator, relied upon Section VI of RMPR 296, which is set forth on Page 29, Appendix A, of petitioner's brief. In so doing, the Price Administrator had the burden of showing that the proper foundation for the issuance of this regulation and of the preceding MPR 296 had been laid in the respective Statements of Considerations accompanying said regulations.

Upon analysis of the respective Statements of Considerations (R. 57-69; 70-75), it appeared that all of the statements therein contained related to standard commercial (or roller milled) flours and that no where in these statements did the Price Administrator give any consideration whatsoever to essential facts and data concerning stone ground (specially milled) flours. The Price Administrator did not seriously dispute this obvious deficiency in his statements of consideration and the court below was thereby led to the following comment:

"In this connection it should be noted that the Administrator in his statement of considerations accompanying RMPR 296 did not mention or refer in any way to these specially milled whole wheat flours and in his brief in this court took the position that

> it 'would be patently inflationary and inconsistent with the purposes of the Emergency Price Control Act to permit the diversion of wheat into a type of flour selling at the higher price.' It thus appears that the Administrator's position is that the producers of specially milled whole wheat flours are merely high cost marginal producers of whole wheat flour who are not entitled to be protected in their historical price differential but must fall by the wayside if they cannot do business at the prices fixed for standard commercial whole wheat flours." (R. 146)

Thus it appears that, at the time of the commencement of the proceedings in the Emergency Court of Appeals, the regulation in question, insofar as it may have been applicable to sone ground flours, was unsupported by any statement of considerations whatsoever.

To cure this vital defect in the record before the court below, the Price Administrator sought to make findings during the course of these proceedings. (R. 31-47; 76-86)

The petitioner regards this as entirely proper and takes exception to the statement of the court below that it is startled by the suggestion that "a party to a controversy which is pending in a court for determination, should have the right, pendente lite, to adjudicate factual issues involved in the litigation." (R. 145)

To support our arguments as to the legal soundness of this statement, we wish to set forth facts as to the action taken by the Price Administrator to prevent fair and impartial consideration of the evidence by the court below.

First, he resorted to the simple expediency of rejecting all evidence submitted by the complainant below on controversial issues, whether or not such evidence was contradicted by his own evidence. Where such evidence was contradicted by the affidavit of a subordinate employe

of the Price Administrator, he accepted such contradictory allegations as verities, although in some instance the contradiction consisted only of mildly negative assertions in the form of "opinions" of the subordinate. (R. 42-47) He rejected without comment or explanation the conclusions of doctors and scientists who are outstanding authorities in the field of nutrition. (R. 5-18; 48-56) In several instances, he made findings which were contrary to his own evidence. For example, his finding that the analysis of his own expert, Verdell E. Munsey, demonstrates that stone ground flour does not have higher calcium and phosphorous content than standard commercial flours (R. 80) is contrary to the report of the Munsey analysis (R. 38) as compared with the analysis of standard wheat flours by Food Research Institute. (R. 40) Again, he relied upon Professor Bailey's findings where they suited his purpose (R. 35, 36, 40) but arbitrarily rejected (R. 82) findings of the same authority as to the higher thiamine content of stoneground flours. (R. 52-53)

These illustrations may throw some light on the reaction of court below to the attempt of the Price Administrator to usurp its power, to prevent consideration of the evidence and to control the conclusions and decision of the Court.

Petitioner further states that the court below held that the findings of the Price Administrator were entitled to no weight whatever in this proceeding. This is contrary to the court's statement. The court held:

> "While the Administrator's statement or opinion, if included, may be helpful to us in adjudicating the issues involved, there is nothing in either statute or rule which compels us to adopt any findings which the Administrator's statement may contain or to abdicate our responsibility, as a court having

the powers of a district court, to make findings of fact and thereupon to decide the issues which the case presents." (R. 146)

It is also of interest to present the second ground upon which the decision of the court below was based:

"Instead of recognizing that a portion of the community believes this to be so and has historically been willing to back up that belief with its money by paying the higher prices which the greater cost of stone-grinding makes necessary, he argues at length that these specially milled whole wheat flours do not in fact have the advantages claimed for them. He thus enters upon a field which has been long and vehemently debated but which is wholly outside his province of price control. To those who earnestly believe that stone-ground whole wheat flour is necessary to their health and well being and who have customarily purchased such flour at the higher level of prices at which it has historically sold the Administrator says, in effect, not that they may not buy it at inflationary prices but that they may not buy it at all since standard commercial whole wheat flour is just as good for them and may be produced more cheaply." (R. 146-147)

The foregoing statement should be considered in the light of the admission of the Price Administrator that such would be the effect of the enforcement of his regulation. (R. 84-85)

SUMMARY OF ARGUMENT.

I. The petitioner is not the successor of the Price Administrator, has no interest in the matters in controversy and has no lawful power or authority to prosecute this petition for a writ of certiorari to the Emergency Court of Appeals.

II. The questions sought to be raised by petitioner are moot:

(a) Because of the expiration of the Emergency Price Control Act and of the Office of Temporary Controls on June 30, 1947; and

(b) Because the questions sought to be raised by the petitioner are limited in applicability to the special and peculiar provisions of the Emergency Price Control Act and can in no manner be applicable to administrative proceedings in general.

III. The Emergency Court of Appeals properly construed Section 204(e) of said Act:

(a) An action under Section 204(a) of the Act is in the nature of an appeal to said Court for the review of proceedings had before the Price Administrator;

(b) An action under Section 204(e) is an original action;

(c) Except for the prohibition contained in the Act, the District Court had jurisdiction and the power to hear the evidence and determine the issues without the interference of and without usurpation of its judicial powers by the Price Administrator;

(d) By creating said Court and providing that it have exclusive jurisdiction in matters concerning the validity of any regulation, order or price schedule under the Act, Congress has vested in said Court full equity jurisdiction and powers in such cases;

(e) In Section 204(a) of the Act, Congress has made due provision for the mere review of protest proceedings before the Price Administrator;

(f) In Section 204(e), Congress has provided for the commencement of the actions therein contemplated and their determination by said Court as original actions;

(g) The Price Administrator was attempting to encroach upon the jurisdiction of said Court and to usurp its power to determine the issues of fact.

IV. The Emergency Court of Appeals did not err in its findings of fact, its conclusions therefrom or in holding the regulation invalid.

ARGUMENT.

I.

The Petitioner Is Not the Successor of the Price Administrator, Has No Interest in the Matters in Controversy and Has No Lawful Power or Authority to Prosecute This Petition for a Writ of Certiorari to the Emergency Court of Appeals.

On December 14, 1946, after entry of judgment in the court below, the petitioner made an exparte application for substitution in the proceeding in the place and stead of Paul A. Porter, Price Administrator. The court below, without notice to the complainant below, entered its order amending its opinion by adding thereto the following paragraph:

> "By Executive Order 9809, effective December 12, 1946, 11 F. R. 14281, the Office of Price Administration and certain other agencies were consolidated to form the Office of Temporary Controls and the functions of the Price Administrator were vested in the Temporary Controls Administrator, including the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending). Pursuant thereto and on motion of counsel for the Temporary Controls Administrator that officer has today been substituted for the Price Administrator as Respondent in this case."

Pursuant to his substitution for the Price Administrator in such proceeding, the petitioner filed his petition for a writh of certiorari in this Court.

We maintain that the provisions of that Executive Order 9809 transferring the functions of the Price Admin-

istrator to the Temporary Controls Administrator are invalid, and that the petitioner did not thereby become the successor of the Price Administrator.

Similar contentions were considered by the United States District Court of the Territory of Hawaii, in the casese of

Porter vs. Hirahara; and Porter vs. Koike,
(Civil Nos. 760, 761).

These cases, decided on January 29, 1947, are to date unreported but a report thereof appears in 15 *United States Law Week,* 2470.

That court took the following view of the status of the petitioner:

> "In my opinion the objections to the pending actions to substitute the Temporary Controls Administrator for the former Price Administrator are well taken. In each case, therefore, the motion be denied.
>
> The plaintiff's argument as to the prospective operations of the powers conferred upon the President by Section 601 of Title 50, Appendix, First War Powers Act, is sound and would be controlling here except for a specific provision of the Emergency Price Control Act itself.
>
> By Section 921(b) of Title 50, Appendix Congress in the Emergency Price Control Act gave the President authority to transfer powers and functions of the Price Administrator to—and only to—other Government departments or agencies having other functions relating to such commodity.
>
> Here the Temporary Controls Administration has no function or functions relating to lumber, either new or used, nor has it ever had such, for it is an

entirely newly-created agency designed to ease the shock of transition from a controlled to a free economy. In my opinion this specific limitation in the Emergency Price Control Act destroys what otherwise would be an effective argument for a contrary holding based upon the President's wide redistribution powers under the First War Powers Act."

A similar position was taken by the District Court of the United States for the District of Oregon in the case of

Paul A. Porter, Administrator vs. Paul K. Ryan (Civil 3246), (decided January 8, 1947; unreported) 15 United States Law Week. 2390,

in which it was said:

"It appears certain now that President Truman does not deem it necessary that the Senate shall confirm the appointment of General Fleming as successor to the functions of the Office of Price Administration.

I do not agree with this view. This is a rent case and I am unable to understand how the President can by-pass the Senate under a clause of the Price Control Act which reads:

' * * *The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, * * * '. Sec. 201(b)

Until further advised I must decline to accept General Fleming in substitution as plaintiff for Paul A. Porter, Price Administrator herein."

Since it thus appears that the petitioner has no interest in the proceeding in the court below and could not himself prosecute an action concerning the matters in controversy in said proceeding, his petition for a writ of certiorari to the court below should be denied.

Peters Patent Corp. vs. Bates & Klinke, Inc., 295 U. S. 392, 79 L. Ed. 1498.

II.

The Questions Sought to Be Raised by the Petitioner Are Moot:

(a) Because of the expiration of the Emergency Price Control Act and of the Office of Temporary Controls on June 30, 1947.

The President's approval of the Deficiency Appropriations Bill on March 22, 1947 set June 30, 1947 as the end of the period of liquidation (including the Office of Price Administration) of the Office of Temporary Controls.

It is apparent that the review of the proceedings in the court below could not be completed, nor could the issues and arguments of the parties be fully and properly submitted, before the date so fixed.

With the expiration of the Emergency Price Control Act, the functioning of the Emergency Court of Appeals also will terminate.

Thus, the review of the proceedings in the court below can serve no useful purpose in the liquidation of the enforcement activities of the Price Administrator.

(b) Because questions sought to be raised by the petitioner are limited in applicability to the special and peculiar provisions of the Emergency Price Control Act and can in no manner be applicable to administrative proceedings in general.

1. The petitioner seeks to establish great public interest and urgent need for review of the proceeding in the court below by informing this Court that there are twelve cases pending before the court below which were brought under Section 204(e) of the Act. He also states that there are presently pending more than 4,500 cases involving alleged price violations and approximately an equal number of cases involving alleged violations of maximum rent regulations and orders. In addition to these, he states, about 8,000 additional violations of price and rent regulations are pending.

Having no means of checking these assertions, we do not question their correctness.

However impressive these figures may be, they shrink to insignificance in the light of the Price Administrator's reports of his enforcement activities.

His Fifth Quarterly Report for the period of February 11, 1942 to April 30, 1943 (78th Congress, 1st Session —House Document No. 302) shows a total of 66,243 investigations but only 3,231 civil and criminal proceedings. (P. 65)

His Eighth Quarterly Report for the full calendar year 1943 shows 650,000 investigations but only 9,131 (counting individual defendants) civil and criminal proceedings. (Pp. 70-71)

His Twelfth Quarterly Report (79th Congress, 1st Session—House Document No. 167) shows, for the calendar year 1944, 338,029 violations but only 26,780 proceedings of all types in the Federal Courts. (P. 75)

His Seventeenth Report (79th Congress, 2nd Session—House Document No. 711) shows, for the calendar year 1945, 167,220 violations and 54.164 proceedings of all types in the Federal Courts; also, for the first quarter of the year 1946, 30,756 violations and 12,683 of such proceedings. (P. 104)

His Eighteenth Report (80th Congress, 1st Session—House Document No. 48) shows for the second quarter of the year 1946, 333,177 violations and 14,206 of such proceedings. (P. 82) This report also shows that from the effective date of the Act through June 30, 1946, the total of 351 complaints were filed in the Emergency Court of Appeals. (P. 67)

Thus it appears that during this period over 1,280,000 cases of violations and over 120,000 civil and criminal proceedings in the Federal courts resulted in the filing of only 351 complaints in the court below.

This data effectively disposes of the thought of great public interest and need for review based upon the number of cases and investigations presently pending.

Moreover, the petitioner has failed to enlighten us, as well he could, as to how many of the twelve cases presently pending in the court below present, or are likely to present, the extraordinary defiiency in the record and the questions resulting therefrom which existed in the proceeding sought to be reviewed.

It is to be hoped, to say the least, that, in no other proceeding before the court below, has the Price Administrator sought to uphold a regulation which is totally unsupported by any contemporaneous data and findings.

2. It is also to be noted that the procedures set up in Section 204 of the Act are very unusual. The Act, of course, was a war measure. It was designed to accomplish speedily the ends which Congress deemed desirable. The regular

Federal courts were deprived of their jurisdiction and a special court was created to determine the validity of regulations. All courts were forbidden to interfere with the activities of the Price Administrator by injunctional orders, excepting only to the limited extent set forth in the Act.

It is doubtful whether Congress would at any time in times of peace enact similar measures with regard to the functions of any administrative body.

Determination of the questions sought to be raised by the petitioner can, therefore, make no useful contribution to general administrative law.

These considerations demonstrate conclusively that the termination of this war-time legislation marks the end of all public interest in its interpretation and in the determination of questions concerning its administration.

III.

The Emergency Court of Appeals Properly Construed Section 204(e) of Said Act.

(a) An action under Section 204(a) of the Act is in the nature of an appeal to said Court for the review of proceedings had before the Price Administrator.

An action brought in said Court under Section 204(a) of the Act necessarily has behind it, and involves, protest proceeding before the Price Administrator. In those proceedings are to be found the protest, the hearing which has included the presentation of evidence, the findings of the Price Administrator and his conclusions or order. Thus, with the possible exception of evidence offered by the protestant and rejected by the Price Administrator or of evidence which could not have been offered by the pro-

testant, there is in existence the complete record of administrative action.

Manifestly, such an action is in the nature of an appeal to said Court for the review of the proceedings had.

(b) An action under Section 204(e) is an original action.

Section 204(e), by its own terms, was designated and intended to afford to the defendant in criminal or civil proceedings brought under Section 205 of the Act the opportunity to have recourse to an action in said Court with respect to any objection "which it (the District Court) finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with Section 203(a) * * * ."

Since there has been no protest proceeding, there is no record to review. The issues between the parties must be framed in said Court and their evidence must, for the first time, be presented in said Court.

Said action in the court below, therefore was an original action in which the Price Administrator had the ordinary status of any other litigant.

(c) Except for the prohibition contained in the Act, the District Court has jurisdiction and the power to hear the evidence and determine the issues without the interference of and without usurpation of its judicial powers by the Price Administrator.

If Congress had not seen fit to restrict the jurisdiction and powers of the District Court (Sec. 204(d) of said Act), the issues presented in said action would have been raised by the complainant as a defense in the proceedings brought against him in the District Court.

The District Court would then have had before it the regulation in question and its contemporaneous supporting Statement of Considerations, and the evidence of the parties. That Court would have had full and exclusive power to determine all issues, including all issues of fact.

It would be absurd to argue that the District Court would permit a mere administrative officer, in the absence of express statutory authorization, to encroach upon its powers at various stages of the proceedings by filing self-serving declarations of subordinate employes and his findings of fact upholding such statements or that the Court would consider itself bound by such findings.

These considerations are of importance in our scrutiny of the provisions of the Act to ascertain whether Congress intended to give such extraordinary powers to the Price Administrator in any independent, original action, involving in no manner any proceedings previously had before him.

(d) By creating said Court and providing that it have exclusive jurisdiction in matters concerning the validity of any regulation, order or price schedule under the Act, Congress has vested in said Court full equity jurisdiction and powers in such cases.

This is the view adopted by the United States Supreme Colurt in the case of:

Yakus vs. United States, 321 U. S. 414, 88 L. Ed. 834.

We submit that said Court was not created merely to serve as an administrative agency of the Price Administrator.

(e) In Section 204(a) of the Act, Congress has made due provision for the mere review of protest proceedings before the Price Administrator.

This is the statement of the obvious.

However, it is of importance to the consideration of the provisions of Section 204(e) to analyze the provisions of Section 204(a).

The various steps provided are as follows:

1. The filing of the complaint in said Court.

2. The filing of the transcript of all material portions of the protest proceedings before the Price Administrator, including a statement of the economic data and other facts of which the Price Administrator has taken official notice.

3. The decision of the Court, setting aside the regulation, dismissing the complaint or remanding the proceeding.

To this order of procedure are added the following general provisions:

1. The Price Administrator may modify or rescind the regulation, order or price schedule at any time, notwithstanding the pendency of the complaint.

2. The court is prohibited from considering any objection, or evidence in support thereof, unless the same is included in the transcript except:

a. Evidence offered to the Administrator and rejected; or

b. Evidence which could not reasonably have been offered to the Administrator or included by him in the proceedings;

with provisions for receipt of such excepted evidence by the Court;

3. The Price Administrator is required to receive such evidence promptly and to certify and file a transcript there-

of and any modification made in the regulation, order or price schedule is a result thereof; and

4. The Price Administrator may request that the evidence be presented directly to the court.

As we shall show, the failure of Congress to make similar provisions as to actions under Section 204(e) and the inapplicability of most of the foregoing provisions to such actions furnish conclusive proof that Congress recognized the fundamental differences between these two separate forms of relief and dealt with them distinctively.

(f) In Section 204(e), Congress has provided for the commencement of the actions therein contemplated and their determination by said Court as original actions.

1. One of the underlying considerations is the fact that, if, as Petitioner contends, the action under Section 204(e) is merely another form of protest proceeding, Congress could easily and simply have provided that the defendant, eligible to commence an action in said Court, be given leave to file his protest and pursue his remedies under Section 203 and Section 204(a). The failure of Congress so to provide is of controlling significance in determining the intent and purpose of the provisions of Section 204(e).

2. Again, the failure of Congress to make express provisions, similar to the provisions of Section 204(a), for the conduct of proceedings under Section 204(e) is conclusive proof of its contrary intention.

The Price Administrator relied entirely upon the provision of Section 204(e) that evidence may be taken "in accordance with subsection (a)" as the support for his argument that the protest procedure applies to said action. This reference to subsection (a) has very limited applicability and is of negligible importance.

Let us consider the applicability of this reference to the general provisions of subsection (a) to demonstrate our point.

Subsection (a) prohibits consideration of objections and evidence not contained in the transcript of proceedings before the Price Administrator. But, in actions under Section 204(e), there have been no proceedings before the Price Administrator. Therefore, the reference has no application to this provision.

Subsection (a) expressly authorizes the reception of certain evidence not included in the transcript. But again the reference in Section 204(e) can have no applicability to this provision because there is no transcript of proceedings before the Price Administrator.

Section 204(a) provides that upon the certification and filing of the transcript of such additional evidence, the Price Administrator shall file "any modification made in the regulation, order or price schedule as a result thereof." Here we again find overwhelming proof of the intentional dissimilarity between the two forms of action.

It is to be noted that Section 204(a) expressly provides:

"That the regulation, order or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint."

It is to be noted further that Section 204(e) contains no similar authorization.

It is apparent, therefore, that the requirement that the Price Administrator, at the time of the filing of the transcript of additional evidence, file also any modification made by him as the result thereof, is related to this express power to modify or rescind notwithstanding the pendency of the complaint. Since no similar power to modify or rescind is granted in Section 204(e), such reference there-

in to the manner of taking evidence in Section 204(a) can have no applicability to such requirement of the filing of any modification as the result of receipt of evidence.

Such analysis of the general provision of Section 204(a) reveals that the provision of Section 204(e) that evidence be taken as provided in subsection (a) can apply only to the following provisions:

> " * * * The Administrator shall promptly receive the same, and such evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof * * * ; except that on request by the Administrator, any such evidence shall be presented directly to the court."

These, and only these, provisions of Section 204(a) can be included in Section 204(e) under this reference.

Thus, it is demonstrated that there can be no occasion in an action under Section 204(e) for the filing of a statement of modification or rescission of a regulation, order or price schedule. Since this is true, it is also true that there can be no occasion for the filing of a statement of economic data and other facts.

3. Our third consideration in relation to the features of an action under Section 204(a) which Congress has failed to make applicable to an action under Section 204(e) is the express authority given to the Administrator to modify or rescind the regulation, order or price schedule at any time, *notwithstanding the pendency of the complaint.*

This difference between the two subsections is of the highest significance in connection with our contention that an action under Section 204(e) is an original suit and is not merely a proceeding for review.

The inclusion of this express authority to modify or rescind in Section 204(a) and its exclusion from the provisions of Section 204(e) and the consideration of the obvious reasons therefor furnish conclusive evidence of such intent of Congress.

A proceeding under Section 204(a) is and can be nothing else but a continuation of protest proceedings. There have been no institution of civil or criminal proceedings against the protestant, or imposition of penalties and no interference with his business activities in injunction. Up to the time of the filing of the complaint in said Court, no court has taken jurisdiction of the controversy and the proceeding before said Court is limited to the review of the action of the Price Administrator. The controversy, therefore, has been and, except for such review, remains in the hands of the Price Administrator. It is reasonable and proper that the Price Administrator have the power and authority to modify or rescind during the proceedings.

The situation in an action under Section 204(e) is entirely different. The complainant has been sued or prosecuted; a district court has assumed jurisdiction and has convicted the complainant or has entered its judgment against him for the recovery of penalties and for an injunction. Moreover, the Emergency Court of Appeals assumes jurisdiction in an entirely new lawsuit which involves no review of any proceedings before the Price Administrator. No modification of the regulation, order or price schedule which falls short of admission of its invalidity can serve to set aside the conviction or judgment of the district court. Rescission, unless given retroactive effect, likewise cannot change such record of conviction or judgment. Hence, Congress refrained from vesting in the Price Administrator authority to modify or rescind during the pendency of the complaint.

Thus it appears that, while Congress has provided in Section 204(a) for the mere review of protest proceedings before the Price Administrator and, by authorizing modification or rescission during the pendenecy of the complaint has placed him largely in control of such actions, it has refrained from limiting in any way the scope of actions under Section 204(e) and has refrained from granting the Price Administrator any special powers or privileges in or control over such actions.

Manifestly, actions brought under Section 204(e) are original actions, in which the Price Administrator stands in the position of any other litigant. Except for the regulation, order or price schedule involved, and the contemporaneous statement of considerations supporting the same, there are no record, or findings or conclusions of the Price Administrator properly before the Court to limit its considerations or its determination of the controvery in any way. The Price Administrator cannot control or direct the course of the proceeding by changing his position during the pendency of the complaint.

(g) **The Price Administrator was attempting to encroach upon the jurisdiction of said Court and to usurp its power to determine the issues of fact.**

The Price Administrator attempted to change the nature of said action from that of an independent, original action to that of a mere proceeding for review. To accomplish this purpose, he made a part of the transcript two statement of economic data and other facts recognized by him. One of these statements was prepared during the course of the taking of evidence; the second was prepared after the conclusion of the reception of evidence. The Price Admininstrator hoped thereby to restrict this Court in its consideration of the evidence.

As we have shown, there exists no power or authority to modify or rescind the regulation, order or price schedule involved in an action under Section 204(e), during the pendency of the complaint. No occasion can lawfully arise in such actions for the filing of such statements.

By so attempting to change the nature of said action, the Price Administrator plainly attempted unlawfully to encroach upon the jurisdiction of said Court and to usurp its powers to determine the issues of fact.

IV.

The Emergency Court of Appeals Did Not Err in Its Findings of Fact, Its Conclusions Therefrom or in Holding the Regulation Invalid.

In the preceding section of this brief, we have demonstrated the soundness of the opinion of the court below in holding that it had the independent power and duty to determine issues of fact, after giving due regard to the findings of the Price Administrator.

An unusual feature of the proceeding in the court below is that said court might well have held the regulation to be invalid, insofar as it applied to specially milled flour, upon the record of the Price Administrator, without considering evidence offered by either of the parties.

Study of the Statements of Considerations accompanying MPR 296 and RMPR 296 makes it apparent beyond dispute that all data and all findings and conclusions therein contained relate solely and exclusively to standard commercial flours, including commercial whole wheat flour, produced by the roller milling process. The Price Administrator did not contend that any part of these statements related to specially milled or stone ground flours.

Instead, he claimed the right to consider data and to make findings as to the latter class of flours after the commencement of the proceedings in the court below.

The following finding of said court, therefore, is merely the statement of an undisputed fact:

> "In this consideration it should be noted that the Administrator in his statement of considerations accompanying RMPR 296 did not mention or refer in any way to these specially milled whole wheat flours • • • ." (R. 146)

Section 202(a) of the Emergency Price Control Act of 1942 (58 Stat. 632; 50 U. S. C. A. App. 902a) provides that, "so far as practicable, in establishing any maximum, price, the Administrator shall ascertain and give due consideration to the prices prevailing" during the stated base period.

In the case of *United States vs. Carolina Freight Carriers Corporation,* 315 U. S. 475, 488-9; 86 L. ed. 971, 981-2; 62 S. Ct. 730, the Court considered the effect of a record supporting the action of an administrative agency, which did not set forth clearly the precise grounds for such action. It was held:

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in Florida vs. United States, 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119, the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decisions; • it is the 'lack of the basic or essential findings re-

quired to support the Commissioner's order. And see United States vs. Baltimore & O. R. Co., 293 U. S. 454, 464, 79 L. Ed. 587, 594, 55 S. Ct. 268; United States vs. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, 510, 511, 79 L. Ed. 1023, 1032, 55 S. Ct. 462. Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which these rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'pre-requisite to the operation of its statutory command.' Opp Cotton Mills vs. Administrator of Wage & Hour Division, 312 U. S. 126, 144, 85 L. Ed. 624, 635, 61 S. Ct. 524."

Thus, it appears that the action of an administrative officer must be supported by a record showing clearly his compliance with the statutory requirements and the ex-

istence of the standards prescribed in the law as the grounds for the exercise of administrative authority.

The court below therefore had before it a regulation which was patently invalid because of the total absence of the pre-requisite administrative record.

Consideration of the foregoing statement of the law in the *Carolina Freight Carriers Corporation* case renders untenable the contention of the Price Administrator that such deficiency may be cured in the reviewing court.

The court below was in a position to disregard all evidence and, confining its considerations to the administrative record, to hold the regulation to be invalid upon the grounds stated by it in the case of

Allied Foods vs. Bowles, 151 F. 2d 449, 456, wherein it was said:

> "The necessary statutory basis, and legal justification for the issuance of a regulation, as disclosed by the history of the price control legislation, is the statement of considerations. Without this, no one could intelligently formulate a protest. Without it, there would be no way to provide against ill-considered and irresponsible action on the part of an Administrator; and there would be no medium of exposing the grounds, upon which the price regulations were based, to public scrutiny."

CONCLUSION.

We respectfully submit, therefore, that for the reasons stated this petition for a writ of certiorari should be denied.

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